APPENDIX A

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 74-1618

United States of America,

Plaintiff-Appellee,

v.

Jerome V. Callahan,

Defendant-Appellant.

ORDER

[Dated May 5, 1975, entered by Chief Judge Fairchild, Circuit Judge Cummings, and Circuit Judge Doyle of the 10th Circuit.*]

This is an appeal of a criminal conviction. The indictment contains two counts under 18 U.S.C. § 1951, the Hobbs Act. Each count describes a distinct extortion transaction. The jury returned a verdict of not guilty on Count 1 and of guilty on Count 2.

The first count alleged that the appellant, a Captain for the Chicago Police Department, obtained the sum of $750 from a Mr. Sannasardo, a tavern owner. The incident which gave rise to this was a fight which occurred on January 19, 1969. A customer who was hurt called the police. The investigating officer went to the tavern. He intimated

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* Sitting by designation.

to Sannasardo that he was in danger of losing his liquor license. Thereupon, Sannasardo offered to pay the officer $100, but the latter said that that would be insufficient and that Sannasardo would have to come to the station. He did so and met appellant police captain who demanded $1200. Negotiations followed and an agreement was made to pay $750 to appellant.

The second count was not dissimilar from the first in that it involved the use of official authority by the appellant against one Medow who operated a liquor store in the appellant's district. It started when the appellant told the owner, Mr. Medow, that he had seen his trucks making illegal deliveries. Appellant told Medow that he had had a similar problem before and had made an arrangement with the owner. He also told Medow that he could use a case of whiskey. Medow gave the case of whiskey to the appellant. Thereafter, appellant came to Medow's store with some regularity. Every five or six weeks he obtained free a case of VO Whiskey worth approximately $60. Medow's testimony was that he felt threatened, that he knew appellant was the Captain of the Police in his district and he considered that it was better to have him as a friend than as an enemy.

On this appeal it is contended that as a result of dissimilarity between the transactions, joinder of the two counts was improper or, in the alternative, that a severance should have been granted due to the prejudice arising from the joinder. The many other points raised by appellant are alleged trial errors:

Alleged improper admission of evidence which occurred prior to January 1969; failure of the court to question the jurors as to newspaper accounts of the trial; insufficiency of the evidence to establish the essential element of

extortion. On this it is maintained that the evidence merely supports the conclusion that these were gifts; failure of the court to instruct the jury on the contrasting definition of bribery; alleged error in the court's instruction to the jury that the court would not, during their deliberations, entertain requests as to the evidence.

The above are some but not all of the points which are advanced. There are other arguments set forth in the brief. Based on a consideration of the entire record together with all of the points argued, we conclude that the judgment must be affirmed.

I.

JOINDER AND SEVERANCE

The argument here, as we have indicated, is that it was prejudicial error to join the two counts which have been described briefly above. The standards for joinder are set forth in Rule 8(a) which provides in pertinent part:

> Two or more offenses may be charged in the same indictment . . . if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Are the offenses here the same or of similar character? The contention is that there is a dissimilarity because 1) there are different victims; 2) different considerations passed, money in the one case and whiskey in the other; 3) the money transaction in Count 1 described a single incident, whereas Count 2 pertains to continuing violations and continuing payment of whiskey; 4) the allegation in Count 1 is that there was extortion by causing fear of economic harm and under color of official right, whereas Count 2 merely alleges color of official right.

There is similarity in that each count alleges use of official position to obtain property from another. True, the victims were different and the property obtained was different. We hold, however, that the differences are less important than the similarity. In both instances official position was used to wrongfully obtain the property of another.

The general character of each case was the same. The factor of different victims assumes little importance. Thus in Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964), joinder of a count charging robbery of one store with a count charging attempted robbery of another store was upheld. *See* United States v. Franklin, 452 F.2d 926 (8th Cir. 1971) involving interstate transportation of forged checks. In *Franklin* count 1 was a transaction which was remote from and unrelated to counts 2 and 3. *See also* Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968), *cert. denied,* 400 U.S. 965 (1970). Here there were two counts of income tax evasion for the years 1962 and 1963. In the case at bar neither remoteness in time nor the fact that one transaction was continuing rendered the counts improperly joined.

United States v. Quinn, 365 F.2d 256 (7th Cir. 1966) is not controlling. There the court said that even if joinder was proper, severance should have been granted in view of the complexity of the transactions.

We recognize that under Rule 14, Fed. Rules Crim. Proc. severance is proper if the joinder is prejudicial.

In our judgment the order here which denied severance was a correct exercise of discretion. United States v. Barrett, 505 F.2d 1091 (7th Cir. 1974); United States v. Hutul, 416 F.2d 607 (7th Cir. 1969), *cert. denied,* 396 U.S. 1012 (1970).

The general rule is that if evidence on one count would be admissible with respect to the other as a similar offense, the denial of severance is proper. *See* Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964). *See also* United States v. Williamson, 482 F.2d 508 (5th Cir. 1973); Robinson v. United States, 459 F.2d 847 (D.C. Cir. 1972); Bradley v. United States, 433 F.2d 1113 (D.C. Cir. 1969). Here, evidence as to each crime is relevant with respect to intent or motive.

We conclude that the two counts in this case were simple and not likely to confuse the jury. The incidents were distinct and the instruction to the jury to consider the evidence in support of each count on a separate basis served to avoid possible confusion.

Appellant finally argues that he was prejudiced because he was deprived of the right to take the stand and testify on one count. It is true that joinder may possibly produce prejudice where the defendant wishes to take the witness stand and testify on less than all of the counts. Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964). But the mere assertion that he may wish to testify in this manner is not sufficient. He must make some showing of prejudice. *See* United States v. Williamson, 482 F.2d 508 (5th Cir. 1973). We find no prejudice in any onerous or invalid sense.

II.

IMPROPER COMMENTS DURING VOIR DIRE

During the voir dire the trial court, in explaining the government's burden of proof and the appellant's right to remain silent, first asked the jury if any of them had feelings for or against policemen. The court then, by way of illustration, stated that the jurors should start out with no advance feelings and without being programmed. Thus

the court used the computer metaphor. Also, the court asked the jurors to consider that they were sitting at either the government's side of the table or the appellant's and to ask themselves whether if it were their case they would be willing to trust the decision to 12 persons with the same attitude which they had.

We are unable to see any error in the use of illustrations of this kind by the court, nor do we perceive error in the court's statement that the evidence of the defense follows that of the government as being an implication that the defense will present a case. The jury was also instructed that the appellant had no obligation to present a case and that he had an absolute right to refuse to testify. In this instance he exercised this right.

III.

EVIDENCE OF OTHER OFFENSES

Count 2 of the indictment charged a continuing offense of extortion of Medow from January 1969 to July 1971. Medow was allowed to testify, however, that the practice of giving liquor to appellant commenced in May or June 1967. It was at this early date that the conversation regarding illegal deliveries took place. The giving of liquor during the years of January 1969 to July 1971 was a continuation of the original transaction. The question posed is whether the action of the court in receiving all of this testimony involving as it does prior criminal activity not charged in the indictment was error.

Appellant makes two points: first, he argues that the evidence does not support the common scheme or plan exception to the rule excluding this kind of evidence. He also argues that since much of this evidence was beyond the statute of limitations, that fact should also bar it.

The second main contention is that the evidence is prohibited by the rule of United States v. Fierson, 419 F.2d 1020 (7th Cir. 1969), wherein the court said that evidence of prior criminal acts is inadmissible to show intent or knowledge if intent or knowledge is not an issue in the case. First, the *Fierson* rule is not applicable because at bar the intent element was more than a formal issue. True, the appellant did not present positive evidence, but evidence was brought out on cross-examination of the government's witnesses and the general object of this was to demonstrate that appellant did not have a corrupt intent. We are mindful also that the intent of the victim Medow was in issue and there were efforts on the part of appellant to establish that Medow's motives were purely charitable. Of course, the 1967 original conversation between Medow and appellant was indispensable to an understanding of the subsequent actions by the parties.

We disagree with the appellant's other contention that the evidence was inadmissible to show a plan or scheme. *See* United States v. Jones, 438 F.2d 461 (7th Cir. 1971); United States v. Turner, 423 F.2d 481 (7th Cir.), *cert. denied,* 398 U.S. 967 (1970). In *Jones* this court said:

> Evidence of other criminal activities is admissible if it is relevant, unless minor probative value is outweighed by major prejudicial effect. And the balancing of probative value against prejudice is, in the first instance, left to the sound discretion of the trial judge.

438 F.2d at 465.

The evidence of the 1967 conversation and the pattern of gifts was probative. Indeed, the value derived far outweighed any prejudicial effect. *See* United States v. Braasch, 505 F.2d 139 (7th Cir. 1974).

Finally, the fact that some of the acts occurred prior to the period of limitations is not a bar. The important consideration is that it was not so remote as to be without probative value. The transaction was continuing and the incidents of it were admissible. *See* United States v. General Motors Corp., 121 F.2d 376, 408 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941).[1]

IV.

PUBLICITY DURING TRIAL

The jury was selected on June 17, 1974 and the case was submitted on June 20, 1974. During this period there were four newspaper articles, two on June 19 and two on June 20. Since the jury was not sequestered, it had access to these articles. Appellant's counsel called the court's atten-

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[1] Appellant also contends the evidence was inadmissible because it was not disclosed in the bill of particulars. Appellant relies on United States v. Neff, 212 F.2d 297 (3d Cir. 1954). Neff was charged with perjury in denying to the grand jury that she had collected dues for the Communist Party. In the bill of particulars the government listed the times of the payments of dues as August, September, October of 1946 and January 1948. The dues were collected from Woolley and Verderosa. At trial the government called an additional witness, not disclosed until trial, who testified as to payment of dues by two other people in 1945. The court held this proof was inadmissible as outside the bill of particulars and that the new evidence had surprised defendant and substantially increased the burden of her defense. In *Neff*, the prosecution had been allowed to produce new evidence from which the jury might convict even if it disbelieved the evidence with respect to the other alleged payments of dues. Here, Callahan was adequately apprised of the offense with which he was charged. A bill of particulars is not to be used as a discovery device. Appellant knew Medow would testify and it was not necessary that the bill of particulars recite what his testimony would be in every detail.

tion to the four articles and requested that the jurors be examined with respect to them. However, the trial court determined after an examination of the articles that there was no prejudicial material in them and on that ground refused to question the jury. The trial court did, however, instruct the jurors repeatedly that they were not to read or listen to any publicity about the case and that it was to consider only evidence introduced in court.

In Margoles v. United States, 407 F.2d 727 (7th Cir.), *cert. denied,* 396 U.S. 833 (1969), there had been extensive publicity. Two articles in particular created problems. The one contained the names and addresses of the jurors resulting in anonymous mail being sent to them. The second published testimony given outside the presence of the jury, which evidence was ruled out. The four articles in the case at bar were mere factual reports which were short and had non-prejudicial headlines. Although they contained minor inaccuracies, they did not bring out evidence which had been ruled inadmissible. Since, therefore, there is a sound basis for the trial court to rule that the articles were not prejudicial, the court was not called on to question the jurors as to whether they had read or heard about the same.

V.

ALLEGED INSUFFICIENCY OF THE EVIDENCE

The argument is that the evidence considered in its best light lacks corrupt character; that it merely shows gratuitous gifts evidenced by the friendly relationship between appellant and Medow. We disagree, however, that this friendliness rules out extortion. *See* United States v. Crowley, 504 F.2d 992 (7th Cir. 1974); United States v. Demet, 486 F.2d 816 (7th Cir. 1973), *cert. denied,* 416 U.S.

969 (1974). The surrounding circumstances were such that the jury could infer the existence of an underlying threat from appellant to Medow, and Medow testified that he was aware of this.

VI.

Further assertions are advanced by appellant. It is contended that the government counsel was guilty of misconduct in closing arguments and that the appellant's counsel was invalidly restricted in his closing argument. It is also said that the judge erred in his final instruction to the jury which admonished the jurors not to make inquiries as to the specific testimony which had been given. We find no error in any of these assignments nor do we perceive error in any of the court's instructions or in the rulings of the court with respect to tendered instructions. We have not failed to consider the argument concerning the denial of appellant's motion for continuance and the assertions regarding the refusal to dismiss the indictment and the allegations with respect to refusal of the court to suppress Medow's testimony. Moreover, we see no error in the action of the court in excusing jurors. Each and every other argument of appellant has been considered and has been determined to be without merit. The cause was carefully and ably tried.

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 7, 1975.

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. William E. Doyle, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 74-1618 vs.

JEROME CALLAHAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(73 CR 890)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause by counsel for the defendant-appellant, no judge in active service having voted to grant the suggestion, and all of members of the panel having voted to deny a rehearing.

It Is Ordered that the petition for a rehearing in the above-entitled cause be and the same is hereby Denied.

APPENDIX C

Summary of Facts

There was a great deal of conflict amongst the three government witnesses—Joseph Sannasardo, proprietor of a tavern (Tr. 106-84); Peter Sannasardo, father of Joseph (Tr. 196-206); and John Landa, patron of the tavern (Tr. 207-22)—concerning Count I.* A summary of all of their testimony follows:

While Joseph Sannasardo was at his parents' apartment, upstairs of his tavern, a fight broke out among some of the patrons. John Landa was injured in the fight and the police were summoned. An officer who identified himself to Joseph Sannasardo as Officer Hippert (and who did not testify) advised him they would have to "pull his license" because of the fight on the premises; Joseph offered him $100 to avoid such action. Hippert told him it would cost a lot more than that; that he would have to see someone at headquarters. At the station Hippert introduced him to a Captain (whom Joseph Sannasardo identified as petitioner) who advised Sannasardo it would cost $1200 to straighten it out; they negotiated as to price, finally settling on $750. Sannasardo had $250 with him which he gave to the Captain, and brought in the balance of $500 the following day. Landa was taken to a hospital by police vehicle the night of the fight, which, according

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* Although petitioner was acquitted upon Count I, the facts pertaining to that Count are briefly set forth herein, inasmuch as the evidence adduced thereon is now pertinent as bearing on petitioner's argument herein that the trial court's refusal to sever the counts for trial resulted in prejudice to him as to Count II, upon which he was convicted. (See Argument, Point 1, pp. 9-14, *supra.*)

to hospital records (Tr. 222-30) was January 19, 1969. No police reports were written up concerning the incident at the tavern, absence of which reports was contrary to standard operating procedure of the police department, according to several witnesses to that effect. An Officer Hippert was on duty the night of the incident in the area where the tavern was located. Petitioner was the Watch Commander on duty on January 19 and 20, 1971, in District 19.

John Fahey, called by the government to identify certain police records and petitioner's signature, and to testify concerning the duties of a watch commander and various police department procedures, testified that he was District Commander of the 19th District from 1962 to May 4, 1970; during the entire period of time that petitioner was a Captain and Watch Commander, Fahey was his commanding officer. On cross-examination, Fahey testified that during petitioner's seven years as a Watch Commander under his supervision, he found petitioner to be an effective police officer and had no bona fide complaints that he was dishonest. (Tr. 258)

As to Count II,** the evidence was as follows:

Robert J. Medow testified that he was president of the corporation which owns and holds the liquor license for Southport Crown Liquors at 3709 N. Southport, Chicago. (Tr. 326-28) During the period January 1969 through

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** A rather detailed summary of the evidence as to Count II is included herein to give this Court an opportunity to consider the impact of errors claimed in this Petition in the light of the factual framework of the entire trial, per *Kotteakos* v. *United States*, 328 U.S. 750, 763-65 (1946), and *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

July 1971, petitioner came to his place of business on the average of every 5-6 weeks to two months, and on each such occasion Medow gave petitioner a case of V.O. whiskey. (Tr. 332-34) Over objection, the witness testified that in May or June of 1967 he had a conversation with petitioner about giving him whiskey, and that the occasions in 1969 through 1971 when he gave petitioner whiskey were a continuation of a practice which started in 1967. (Tr. 334-36) Petitioner's motion for mistrial was denied. (Tr. 336) Medow testified that at this initial 1967 conversation, at which only he and petitioner were present (Tr. 335), petitioner told him he had seen Medow's delivery trucks delivering whiskey and beer to taverns, and asked him didn't he know that was against the law. Medow said he knew it was against the law, and that petitioner "related that he had come up against the same kind of problem" previously. (Tr. 336) "He said he had come to some type of arrangement with the other retail liquor owner, Rothchild by name." Petitioner's motion for mistrial was denied. (Tr. 337) Medow testified petitioner said, "I could use a case of whiskey," and he gave him one (in May or June 1967). (Tr. 337) (Renewal of motion for mistrial, denied. Tr. 337-38) Medow stated he felt threatened by petitioner because he (Medow) was doing something "slightly irregular". (Motion for mistrial, denied. Tr. 338-39) After that, petitioner would call every 5 weeks to two months and say he was out of whiskey, he could use a case of whiskey and would come to Medow's store, and on each occasion Medow gave him a case of V.O. (Tr. 339) With respect to the subsequent deliveries of cases of whiskey by Medow to petitioner, Medow testified:

> "I never changed my state of mind. The other reason would be that if you are a retail liquor license holder

in Chicago, Police Captains are very important. If I had a choice of having one as a friend or enemy, it would be better to have a friend. I don't know what the Captain intended to do, but that is the way I felt." (Tr. 340)

Petitioner never offered to pay for a case of liquor. Each case of V.O. which Medow gave petitioner came from the store's inventory. A case of V.O. retailed for from between $60 and $66 in 1969. Medow directed his co-worker, William Nass, to allow petitioner to obtain cases of V.O. liquor from the store. Each case contained 12 fifths of V.O. whiskey (Tr. 340-42)

The government was permitting to elicit on direct, over objection, that Medow had been granted immunity as regards his testimony. (Tr. 326-27)

On cross-examination, Medow testified that his brother-in-law, an attorney with offices in Medow's building, advised him to ask for immunity. (Tr. 343-45) Medow continued giving petitioner cases of V.O. until sometime in 1973. Petitioner purchased liquor from Medow's store for petitioner's daughter's wedding in October of 1970. (Tr. 345-46) The conversation relative to this purchase was a friendly one at the store; Medow and petitioner had many such friendly conversations over the years they had contact. (Tr. 346) In 1969 or 1970, on one occasion, Medow had a conversation with petitioner at petitioner's office at the police station, wherein Medow tried to intercede on behalf of a friend of his who was a bar owner. (Tr. 346-47) Medow was aware that petitioner's daughter, who is Irish, was marrying a Jewish boy. Petitioner needed champagne for the wedding; Medow helped him select the champagne and gave him a good price on it. (Tr. 348) Medow's business is in the nature of a large discount

liquor store rather than a local bar. (Tr. 348-49) In the past, Medow had made gifts to other police officers, both at Christmas time and on other occasions, both of cash and liquor. (Tr. 349) During the period of time covered by the indictment, January 1969 to July 1971, Medow never asked petitioner for an improper act of any form. (Tr. 351) If there was a choice on his part, Medow testified, he wanted petitioner as a friend. (Tr. 351) Medow had refused to speak to various investigators petitioner's counsel had sent to interview him (Tr. 350), but on one occasion Medow sold one of petitioner's investigators a case of wine for a very good price. (Tr. 352) Neither that investigator nor the court reporter who accompanied him to Medow's establishment threatened Medow in any way. (Tr. 352-53) Medow was invited to petitioner's house to a party. (Tr. 353) Medow gave petitioner some decorations —three stuffed leprechauns—for use at that party. (Tr. 353-54)

During the period from January 1969 to July 1971, petitioner did not threaten Medow. (Tr. 354)

When Medow was interviewed by the FBI, he was never told that he (Medow) had committed any crime (Tr. 355), and he never stated that petitioner had extorted him. (Tr. 356)

Petitioner never threatened to put Medow out of business or to take his license. (Tr. 356)

On one occasion Medow asked petitioner to come out and take a look at Medow's trucks and parking area from a security standpoint; the parking area is not visible from the street. While Medow did not remember exactly, he testified it was possible that he had asked petitioner to keep a lookout in the evening for the trucks in the back, and also to look out for and keep his eye on Medow's store, which contained substantial inventory. (Tr. 357-58)

On redirect, Medow testified that when petitioner purchased alcoholic beverages for his daughter's wedding, he asked how much it was going to cost. He never asked how much the cases of V.O. would cost. (Tr. 358-59) Medow did not consider the cases of V.O. as gifts; he considered that petitioner had threatened him for something he knew Medow was doing that was "slightly irregular," and Medow felt it was "sort of blackmail." (Motion for mistrial, no ruling thereon.) (Tr. 359) Medow's trucks continued making deliveries to liquor stores during 1969 through 1971 (Tr. 359-60); he stopped in 1972 after the State stopped them. (Tr. 360) If petitioner had not been a Police Captain, Medow would not have given him liquor on a regular basis. (Tr. 360) (Objection, overruled) Medow continued to give petitioner cases of V.O. even after his trucks stopped delivering to retail establishments in January 1972. (Tr. 361)

William Nass testified that he has been employed by Medow's establishment for the past 15 years. (Tr. 362) About four or five years ago (Tr. 363) Nass was told by Medow that petitioner was coming in, and if he came in to give him a case of liquor. (Tr. 364) Petitioner did not pay or offer to pay Nass for the liquor. (Tr. 364-365) During the period January 1969 to July 1971, Nass personally allowed petitioner to obtain cases of liquor several times, under orders from Medow. (Tr. 365) The liquor he allowed petitioner to have were cases of fifths of V.O. whiskey. (Tr. 366)

On cross-examination, Nass testified that on each of the occasions when petitioner would get whiskey from Nass after getting instructions from Medow (Tr. 366-67), petitioner came into the establishment himself; he was always pleasant; Nass never saw him threaten or get hos-

tile with anyone, neither with himself (Nass) or Medow, or anyone else. (Tr. 367) Nass knew petitioner to be Watch Commander in the district. At the time, Nass never thought of calling the police because petitioner was getting whiskey from Medow. (Tr. 367) Nass never heard Medow state that he wanted petitioner to break the law, or that he wanted something from petitioner that would violate the law, for giving petitioner whiskey. (Tr. 367-68) Nass testified he was Medow's right-hand-man; when Medow was not there, Nass was in charge; Nass has a key to the establishment, wherein liquor worth many tens of thousands of dollars is kept. Medow has confidence in Nass. Nass's dealings with petitioner were always amicable. (Tr. 368)

The government presented evidence that both liquor stores purchased alcoholic beverages from outside Illinois for resale in Illinois. (Tr. 291-326)

After the government rested (Tr. 369), the court denied petitioner's motion for acquittal at the close of the government's case. (Tr. 378) The defense rested. (Tr. 390) The court reserved ruling on petitioner's motion for directed verdict at the close of all the evidence (Tr. 446) and denied said motion as to Count II after the verdict was returned. (R. 57)